TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00582-CR

Ralph Alfred Friesenhahn, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF COMAL COUNTY, 207TH JUDICIAL DISTRICT
NO. CR2012-288, THE HONORABLE JACK H. ROBISON, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

A jury convicted appellant Ralph Alfred Friesenhahn of felony driving while intoxicated, *see* Tex. Penal Code §§ 49.04(a), 49.09(b)(2), and assessed his punishment at confinement for four years in the Texas Department of Criminal Justice and a $1,000 fine, *see id.* § 12.34. In a single point of error on appeal, appellant challenges the trial court's denial of his pretrial motion to quash the indictment. Finding no error in the ruling, we affirm the trial court's judgment of conviction.

BACKGROUND

Appellant was charged by indictment with felony DWI. *See id.* §§ 49.04(a), 49.09(b)(2). Section 49.04 of the Penal Code, the DWI statute, provides that "[a] person commits an offense if the person is intoxicated while operating a motor vehicle in a public place." *See id.* § 49.04(a); *see also id.* § 49.04(a) (elevating offense to third degree felony if defendant has been

convicted twice before of DWI offense). For purposes of the intoxication offenses set forth in Chapter 49 of the Penal Code, which includes section 49.04, section 49.01 of the Penal Code defines "intoxicated" as

> (A) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body; or
>
> (B) having an alcohol concentration of 0.08 or more.

Id. § 49.01(2). Prior to trial, appellant filed a motion to quash the indictment asserting that "the indictment [was] based on a statute that violates the Equal Protection Clause of the U.S. Constitution and the Texas Constitution." Specifically, appellant claimed that the statutory definition of intoxicated as having an alcohol concentration of 0.08 or more, set forth in section 49.01(2)(B) and incorporated into section 49.04, violates equal protection because it unfairly discriminates against alcoholics.

The trial court considered appellant's motion to quash at trial before jury selection. Appellant offered no evidence in support of his motion but merely offered argument to the court. Appellant asserted that "the statute of .08 being the legal threshold for intoxication" discriminates against alcoholics because "many of those folks who suffer from the disease of alcoholism are able to maintain normal functioning at .08 versus a person who does not [suffer from the disease of alcoholism]." To support this contention, appellant mentioned "studies" that have been done—though none were provided to the trial court—and referred to federal agencies that classify alcoholism as a disease—though no evidence of this was presented to the trial court. Appellant

argued that the 0.08 alcohol concentration definition "force[s] a strict liability of criminal responsibility on something that an alcoholic would possibly have no control over," which, he maintained, violates an alcoholic's equal protection rights. He noted that historically "per se driving laws" regarding "blood alcohol contents" have dropped the level of the statutory limit since the inception of such statutes, and opined that "there has been very little impact" of the limit being lowered. He urged that, given the "more common and modern approach that alcoholism is a disease and an affliction that is not necessarily curable without proper treatment . . . the time is right for the judicial branch of the government to refocus on these laws to find out if our citizens that suffer from this disease are being unfairly treated versus other members of the society." The trial court denied the motion to quash.

DISCUSSION

In his sole point of error, appellant maintains that alcoholism is a disability under the Americans with Disabilities Act, asserts that the 0.08 per se definition of intoxication "does little to improve highway safety," and claims that the 0.08 presumption is "arbitrary and overly broad."[1] He asks this Court to "find[] that Texas Penal Code § 49.04 and 49.01(2)(B) violate[] the right to equal protection guaranteed by the United States Constitution and Texas Constitution."[2] Based on

[1] We note that the studies and case law presented in appellant's brief to support his constitutional challenge are presented for the first time in this appeal and were not presented to the trial court during the hearing on the motion to quash.

[2] Appellant challenges the statutes under both the United States and Texas Constitutions. However, the Court of Criminal Appeals has held that the Texas equal rights provision and the federal equal protection provision are coterminous. *See Cannady v. State*, 11 S.W.3d 205, 215 (Tex. Crim. App. 2000). Therefore, the analysis under the Texas Constitution is the same as the analysis under the United States Constitution, *see Modarresi v. State*, 488 S.W.3d 455, 464 n.4 (Tex.

appellant's briefing and prayer, we construe his argument as a challenge to the trial court's denial of his motion to quash the indictment.

When a trial court's ruling on a defendant's motion to quash an indictment concerns a matter unrelated to the credibility or demeanor of witnesses, such as the constitutionality of a statute, we review the ruling *de novo*. *Lawrence v. State*, 240 S.W.3d 912, 915 (Tex. Crim. App. 2007); *see State v. Moff*, 154 S.W.3d 599, 601 (Tex. Crim. App. 2004) ("When the resolution of a question of law does not turn on an evaluation of the credibility and demeanor of a witness, then the trial court is not in a better position to make the determination, so appellate courts should conduct a de novo review of the issue. . . . The trial court's decision in this case was based only on the indictment, the motion to quash, and the argument of counsel, so the trial court was in no better position than an appellate court to decide this issue.").

There are two types of challenges to the constitutionality of a statute: the statute is unconstitutional on its face, or the statute is unconstitutional as applied to the defendant. *Fluellen v. State*, 104 S.W.3d 152, 167 (Tex. App.—Texarkana 2003, no pet.); *see Karenev v. State*, 281 S.W.3d 428, 435 (Tex. Crim. App. 2009) (Cochran, J., concurring) ("[W]hat is the difference between a facial challenge and an 'as applied' challenge to the constitutionality of a penal statute? Evidence. A facial challenge is based solely upon the face of the penal statute and the charging instrument, while an applied challenge depends upon the evidence adduced at a trial or hearing.").

App.—Houston [14th Dist.] 2016, no pet.), and we do not address appellant's Texas Constitutional claim separately.

A facial challenge is an attack on the statute itself as opposed to a particular application. *Salinas v. State*, 523 S.W.3d 103, 106 (Tex. Crim. App. 2017); *Peraza v. State*, 467 S.W.3d 508, 514 (Tex. Crim. App. 2015). Except when First Amendment freedoms are involved, a facial challenge to a statute is a claim that a statute, by its terms, operates unconstitutionally in all possible circumstances.[3] *Salinas*, 523 S.W.3d at 106; *State v. Johnson*, 475 S.W.3d 860, 864 (Tex. Crim. App. 2015); *State v. Rosseau*, 396 S.W.3d 550, 557 (Tex. Crim. App. 2013). To prevail on a facial challenge to the constitutionality of a statute, a party must demonstrate the statute always operates unconstitutionally in all possible circumstances; in other words, no set of circumstances exists under which the statute would be constitutionally valid. *Peraza*, 467 S.W.3d at 514; *Rosseau*, 396 S.W.3d at 557; *State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 908 (Tex. Crim. App. 2011) (orig. proceeding); *Gillenwaters v. State*, 205 S.W.3d 534, 536 n.2 (Tex. Crim. App. 2006). In a facial challenge to a statute's constitutionality, courts consider the statute only as it is written, not how it operates, or may operate, in practice. *Salinas v. State*, 464 S.W.3d 363, 367 (Tex. Crim. App. 2015); *Lykos*, 330 S.W.3d at 908; *see Peraza*, 467 S.W.3d at 515.

A claim that a statute is unconstitutional "as applied" is a claim that the statute, although generally constitutional, operates unconstitutionally as to the claimant because of his

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[3] The United States Supreme Court recognizes "a second type of facial challenge," whereby a law involving First Amendment freedoms may be invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010); *State v. Johnson*, 475 S.W.3d 860, 864–65 (Tex. Crim. App. 2015) (recognizing that under First Amendment's "overbreadth" doctrine, "a law may be declared unconstitutional on its face, even if it may have some legitimate application and even if the parties before the court were not engaged in activity protected by the First Amendment").

particular facts and circumstances. *Lykos*, 330 S.W.3d at 910; *Gillenwaters*, 205 S.W.3d at 537 n.3; *Ex parte Carter*, 514 S.W.3d 776, 779 (Tex. App.—Austin 2017, pet. ref'd). A statute may be valid as applied to one set of facts and invalid as applied to a different set of facts. *Lykos*, 330 S.W.3d at 910. An "as applied" constitutional challenge typically may not be resolved pretrial because it depends on development of the specific facts of the case showing how the statute is being applied to the defendant. *Ex parte Carter*, 514 S.W.3d at 779; *see Lykos*, 330 S.W.3d at 910 ("An 'as applied' challenge is brought during or after a trial on the merits, for it is only then that the trial judge and reviewing courts have the particular facts and circumstances of the case needed to determine whether the statute or law has been applied in an unconstitutional manner.").

We review a challenge to the constitutionality of a statute *de novo*. *Vandyke v. State*, — S.W.3d —, No. PD-0283-16, 2017 WL 6505800, at *5 (Tex. Crim. App. Dec. 20, 2017); *Salinas*, 464 S.W.3d at 366. The party challenging the statute normally bears the burden of establishing its unconstitutionality. *Vandyke*, 2017 WL 6505800, at *5; *Peraza*, 467 S.W.3d at 514; *Ex parte Lo*, 424 S.W.3d 10, 15 (Tex. Crim. App. 2014); *see Schlittler v. State*, 488 S.W.3d 306, 313 (Tex. Crim. App. 2016), *cert. denied*, 137 S. Ct. 1336 (2017) ("An individual bringing a challenge to a criminal statute must 'shoulder the burden to establish that [the statute] is unconstitutional.'" (quoting *Luquis v. State*, 72 S.W.3d 355, 365 (Tex. Crim. App. 2002))). When confronted with an attack on the constitutionality of a statute, we afford great deference to the Legislature and presume that the statute is constitutional and that the Legislature has not acted unreasonably or arbitrarily. *Vandyke*, 2017 WL 6505800, at *5; *Peraza*, 467 S.W.3d at 514; *Ex parte Lo*, 424 S.W.3d at 14–15; *Rosseau*, 396 S.W.3d at 557; *see* Tex. Gov't Code § 311.021 (stating that courts presume "compliance" with

Texas and United States Constitutions). Bearing in mind this presumption, we examine Penal Code sections 49.04 and 49.01(2)(B) together with the constitutional right that appellant contends they offend.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *Schlittler*, 488 S.W.3d at 316; *see* U.S. Const. amend XIV; *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); *Rosseau*, 396 S.W.3d at 557. "A threshold for asserting an equal-protection challenge is demonstrating that a classification discriminates among similarly situated individuals." *Modarresi v. State*, 488 S.W.3d 455, 467–68 (Tex. App.—Houston [14th Dist.] 2016, no pet.); *see Smith v. State*, 898 S.W.2d 838, 847 (Tex. Crim. App. 1995). Thus, our initial inquiry when reviewing an equal protection argument is whether the challenged statute treats similarly situated persons differently. *Barker v. State*, 335 S.W.3d 731, 734 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd); *see Nonn v. State*, 117 S.W.3d 874, 881–82 (Tex. Crim. App. 2003). If it does not, the challenge must fail. *Barker*, 335 S.W.3d at 734; *see Nonn*, 117 S.W.3d at 882.

The crux of appellant's argument, as presented in his motion to quash, is that the statutory definition of "intoxicated" as having an alcohol concentration of 0.08 or more that is incorporated into the DWI statute "unfairly applies" to "the protected class of alcoholics." Appellant maintains that it is "well settled" that alcoholics have a higher tolerance to alcohol than other drinkers and therefore the 0.08 alcohol concentration level "unfairly discriminates" against those who have the disease of alcoholism. He contends that the DWI statutory scheme allows for the

prosecution of members of the "protected class of alcoholics" without ever showing that the alcoholic defendant lost control of his (or her) mental or physical faculties.

However, section 49.01(2) provides two alternative definitions of intoxicated. The first involves the loss of the normal use of mental or physical faculties; the second involves an alcohol concentration of at least 0.08. *See* Tex. Penal Code § 49.01(2). The alternative definitions are presented disjunctively, *see id.*, indicating that only one must be satisfied to establish that a person is legally intoxicated. Further, these alternative definitions apply to *all* persons charged with an intoxication offense under Chapter 49. Thus, the alcohol concentration definition of intoxicated allows for a finding of intoxication based on an alcohol concentration of 0.08 or more without showing the loss of mental or physical faculties for *any* defendant charged with an intoxication offense under Chapter 49. Therefore, any defendant prosecuted for driving while intoxicated can be found to be legally intoxicated based on an alcohol concentration of 0.08 or more without a showing of the loss of mental or physical faculties—whether the defendant is an alcoholic or not. Therefore, there is no classification in the statute that treats any persons, including appellant's defined "class" of alcoholics, differently than similarly situated persons: the 0.08 alcohol concentration level applies to all offenders prosecuted for DWI. *See Matchett v. State*, 941 S.W.2d 922, 934 (Tex. Crim. App. 1996) ("Because those committing the same offense on the same day are subject to the same statutory scheme, they are similarly situated and are similarly treated. Appellant presents no equal protection violation.") (internal citation omitted).

Furthermore, because a facial constitutional challenge seeks to establish that the statute is unconstitutional and unenforceable as to any person to whom the statute applies, *see Lykos*,

330 S.W.3d at 908, in order to successfully mount a facial challenge to sections 49.04 and 49.01(2)(B), appellant must establish that no set of circumstances exists under which those statutes would be valid. He failed to do so. His argument implicitly concedes that the statutory scheme is constitutional as it relates to offenders who are not alcoholics—that is, the 0.08 alcohol concentration level appropriately applies to "temperate drinkers" who do not have a high tolerance to alcohol.

To the extent that appellant's challenge could be construed to be an "as applied" constitutional challenge to the DWI statutory scheme, his equal protection challenge likewise fails. First, a pretrial motion to quash an indictment may be used only for a facial challenge to the constitutionality of a statute. *State v. Empey*, 502 S.W.3d 186, 189–90 (Tex. App.—Fort Worth 2016, no pet.); *Jimenez v. State*, 419 S.W.3d 706, 714 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd); *see Lykos*, 330 S.W.3d at 910 (because contention that statute is unconstitutional as applied requires recourse to evidence, it cannot be properly raised by pretrial motion to quash charging instrument) (citing *Gillenwaters*, 205 S.W.3d at 536 n.4). Second, to prevail on an "as applied" challenge here, appellant must show that sections 49.04 and 49.01(2)(B) yield an unconstitutional result when they are applied to the facts and circumstances of his case. *See Lykos*, 330 S.W.3d at 910. He failed to do so. First, appellant presented no evidence to the trial court that alcoholics are a protected class. He merely advanced this proposition based on his assertion that alcoholism is a disease—an assertion made summarily during argument without presenting evidentiary support to the trial court.[4] Second, even if alcoholics are a protected class as appellant claims and the DWI

[4] Appellant expands this proposition on appeal, claiming that because alcoholism is a disease it qualifies as a "disability" under the Americans with Disabilities Act.

statutory scheme treats alcoholics differently than other DWI offenders (which we have concluded it does not), appellant offered no evidence at the hearing on the motion to quash (or subsequently during trial) that he himself was an alcoholic and therefore part of the class purportedly discriminated against.

In essence, appellant does not argue that members of his defined class of alcoholics are treated differently than other DWI defendants under the statutes. Instead, he argues that they ***should*** be treated differently. Appellant's argument—complaining about the 0.08 alcohol concentration standard being applied to alcoholics in the same manner that it is applied to offenders who are not alcoholics—challenges the failure of the DWI statutory scheme to provide different treatment of defendants who are alcoholics and, according to appellant, "maintain normal functioning" with an alcohol concentration of 0.08 because of "a significantly higher tolerance to alcohol." In fact, he asserts in his brief that alcoholics "are grouped together like the average DWI defendant, but should not be due to their involuntary illness." This "deserving of different treatment" argument does not demonstrate that similarly situated persons are treated differently and thus, fails to establish an equal-protection violation. *See Modarresi*, 488 S.W.3d at 467 (rejecting capital-murder defendant's equal-protection challenge, which claimed that statute mandating sentence of life without parole "unfairly targets" entire class—"women with mental illness exacerbated by postpartum depression"—by subjecting them to mandatory sentence of life without parole and disallowing mitigating evidence because all adult offenders convicted of capital murder receive mandatory sentence of life without parole when State does not seek death penalty); *see also Smith*, 898 S.W.2d at 847 (rejecting capital-murder defendant's equal-protection challenge to statute

prohibiting providing information regarding parole to jury in capital cases while permitting such information in non-capital cases because defendant was treated same as all other capital-murder defendants).

In sum, because the 0.08 alcohol concentration definition of intoxicated applies to all DWI offenders, all similarly situated persons are treated alike under the DWI statutory scheme. Therefore, appellant failed to establish that Penal Code sections 49.04 and 49.01(2)(B) violate equal protection rights under the United States and Texas Constitutions or that the statutes are unconstitutional on their face or as applied to him. Accordingly, the trial court did not err by denying appellant's motion to quash. We overrule appellant's sole point of error.

CONCLUSION

Appellant failed to meet his burden of establishing that Penal Code sections 49.04 and 49.01(2)(B) are unconstitutional, either on their face or as applied to him, because they violate equal protection rights. Consequently, the trial court did not err in denying appellant's motion to quash the indictment. We affirm the trial court's judgment of conviction.

Cindy Olson Bourland, Justice

Before Justices Puryear, Field, and Bourland

Affirmed

Filed: February 9, 2018

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